Supreme Court, U. S.
FILED
JUL 25 1978
MICHAEL RODAK, JR., CLERK

No. 77-1721

In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWARD T. LYSEK AND ISABEL J. LYSEK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
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The question presented in this federal income tax case is whether the Tax Court properly dismissed petitioners' action for failure to prosecute their case.

The dismissal occurred approximately six years after petitioners commenced this litigation in the Tax Court, for redetermination of deficiencies determined for 1967-1970 (R. 1, 4, 12, 15, 55-58, 114-119).[1] Their petition, however, did not specify that the Commissioner's determination was based upon any specific factual or legal errors, but rather generally alleged that the deficiencies were "excessive and without a rational foundation" (R. 1-2). Thereafter, the Tax Court ordered petitioners to

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[1] "R." refers to the record appendix in the court of appeals.

attend a pretrial conference for the purpose of "narrowing issues." This order specifically warned petitioners that their unjustified failure to attend that conference could result in a dismissal of their suit and entry of a decision against them (R. 37-38, 47-48). Petitioners nevertheless failed to appear at the conference and the Tax Court dismissed their suit for failure to prosecute (Pet. App. A, pp. i-iv). The court of appeals reversed (Pet. App. B). It stated that "[i]t appears that all of the appellants followed the tax advice of two grossly incompetent individuals" whose "catalog of malpractice is too extensive to recount here * * *" (Pet. App. B, pp. v-vi). It therefore remanded the case to the Tax Court "[i]n the interests of justice * * * for consideration of the books and records of the taxpayers which previously were not submitted by the taxpayers because of the grossly erroneous advice upon which they relied" (Pet. App. B, pp. vi-vii).

On remand, the Tax Court ordered petitioners to meet with counsel for the Commissioner and to bring with them "all of their books and records which show, or which may be claimed to show, that they are entitled to the adjustments at issue" (R. 37, 47). Petitioners took no action to meet with counsel for the Commissioner or to prepare their case for trial. Their only action on remand was to file a series of motions in the Tax Court reiterating their claims that the deficiency notices here were "without a rational foundation" (R. 86); that they were "under no obligation to show either the Tax Court or the Commissioner any other correct tax than the petitioner's [*sic*] self-assessment", that any attempt by the Tax Court to force them to divulge their books and records would constitute "a flagrant grab of power not vested in the Tax Court * * * and a display of arrogant and abusive bias and prejudice for the Commissioner" (R. 86-88); that any attempt by the Commissioner to examine or any

proceeding that required them to divulge their books and records would violate their Fifth Amendment privilege against compulsory self-incrimination (R. 103-105); and that the Tax Court should remand their cases to the Commissioner (R. 89-90). After it became apparent that petitioners were unwilling to proceed to trial, the Tax Court dismissed their action for failure properly to prosecute (Pet. App. C, pp. viii-xi). The court of appeals affirmed by order (Pet. App. D, p. xii).

The Tax Court's order of dismissal was proper. It is well established that a trial court has discretion to dismiss a suit when the moving party fails properly to prosecute the action he initiated. *Link* v. *Wabash Railroad Co.*, 370 U.S. 626; *Montgomery* v. *Commissioner*, 367 F. 2d 917 (C.A. 9). Petitioners were granted two opportunities to prosecute their action for a redetermination of income tax deficiencies, and twice declined to do so. Accordingly, they cannot complain that their action was dismissed as a result.

Contrary to petitioners' argument (Pet. 8-9), Rule 91 of the Rules of Practice and Procedure of the United States Tax Court does not establish a mandatory procedure that compels a party willing to enter into a stipulation to file a motion requiring the opposing party to show cause why the matters covered should not be deemed admitted for purposes of the case, nor does it require that the Tax Court hold a hearing if such a motion is actually filed. Moreover, Rule 50(b) of the Tax Court's Rules does not, as petitioners urge (Pet. 9), require the court to hold a hearing prior to dismissing a case for failure to prosecute. That rule provides that the court shall take such action as it deems appropriate in accordance with its discretion (see Pet. App. F, p. xix).

Finally, petitioners err in invoking thier Fifth Amendment privilege against compulsory self-incrimination as a bar to the Tax Court's dismissal of their suit.[2] This Court has repeatedly held that the constitutional protection accorded by the Fifth Amendment is designed to "[protect] against real dangers, not remote and speculative possibilities." *E.g., Zicarelli* v. *New Jersey Investigation Comm'n*, 406 U.S. 472, 478; *Marchetti* v. *United States*, 390 U.S. 39, 48; *Hoffman* v. *United States*, 341 U.S. 479, 486; *Rogers* v. *United States*, 340 U.S. 367, 372-373. Petitioners have not alleged any fact that would support a finding that their production of books and records might place them in danger of legal detriment. On the contrary, all that is before the court is their blanket claim that opening their books and records would produce that result. Such claims cannot insulate them from a requirement that they produce books and records or suffer the dismissal of their suit. *United States* v. *Theep*, 502 F. 2d 797 (C.A.9); *United States* v. *Cromer*, 483 F. 2d 99 (C.A.9); *United States* v. *Bell*, 448 F. 2d 40 (C.A. 9); *United States* v. *Roundtree*, 420 F. 2d 845, 852 (C.A. 5). See also *Figueiredo* v. *Commissioner*, 54 T.C. 1508, affirmed by order, March 14, 1973 (C.A. 9) (No. 71-1139) (73-2 U.S.T.C. para. 9713).[3]

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[2]For the first time, petitioners allege (Pet. 9) that "their tax records * * * had been unlawfully seized by the Commissioner and never returned to petitioners." This claim is not supported by the record. An affidavit executed in an unrelated litigation alleged that the Commissioner seized certain records in the possession of petitioners' accountant. However, nothing in the record establishes that anything belonging to petitioners was taken in this alleged seizure. Moreover, even assuming the correctness of the allegations of the affidavit, petitioners' Fifth Amendment rights would not have been violated. *Fisher* v. *United States*, 425 U.S. 391; *Andresen* v. *Maryland*, 427 U.S. 463.

[3]There is also no merit in petitioners' argument (Pet. 11) that two judges of the court of appeals could not review the Tax Court's dismissal. A two-judge panel constitutes a quorum for adjudicating appellate cases. See 28 U.S.C. 46(d). Moreover, the court has the discretion to determine in each case whether oral argument shall be heard. *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 272-284.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1978.